85-2114

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

LAWRENCE BELL, WILBERT BELL,
KERNAN PERKINS and GEORGE HARDY
Petitioners

v.

DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, EAST LOUISIANA
STATE HOSPITAL and DEPARTMENT OF
STATE CIVIL SERVICE FOR THE
STATE OF LOUISIANA
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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351P

QUESTION PRESENTED FOR REVIEW

Whether minimum due process of law under the Fourteenth Amendment to the United States Constitution requires prior notice and an informal opportunity to be heard where the property interests of tenured state civil service employees in retaining their previous levels of earnings are adversely affected by the non-disciplinary actions of a state department of civil service.

PARTIES

The caption identifies all the parties.

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OPINIONS BELOW

The opinion of the Louisiana State Civil Service Commission is unreported. It is reproduced in the Appendix hereto. The opinion of the Court of Appeal for the First Circuit of Louisiana is reported at 472 So.2d 235. It is also reproduced in the Appendix hereto. The opinion of the Supreme Court for the State of Louisiana is reported at 483 So.2d 945. It is also reproduced in the Appendix hereto.

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The opinion of the Louisiana Supreme Court was

entered on February 24, 1986. A petition for rehearing was timely filed but denied on March 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

That portion of the Fourteenth Amendment to the United States Constitution which provides that no State shall deprive any person of life, liberty or property without due process of law.

STATEMENT OF THE CASE

This is a civil service case brought by four (4) permanent classified State employees from the partial dismissal by the Louisiana State

Civil Service Commission of their appeal on a Motion for Summary Disposition which was treated by the Commission as Motion to Dismiss for Failure to State a Claim upon which Relief May Be Granted.

Petitioners are long-time employees of the State of Louisiana. Their appeal to the State Civil Service Commission alleged that on December 23, 1982, they received written notice that summarily and henceforth they held the positions of "Laborer-Utility" rather than their previous positions of "Equipment-Operators." It was also alleged that these reallocations, if

allowed to be effectuated, will result in substantial reductions of the salaries these men have been earning for many years, to the extent of approximately one-third (1/3) of their salaries. It was also alleged that their salaries had been summarily frozen as of the date of the reallocations. Petitioners asserted several state law grounds for appeal and the federal ground that the procedures utilized to effectuate these reallocations violated minimal procedural due process. In support of this contention, petitioners specifically alleged that they received no prior notice of the

reallocations and that the civil service director refused petitioners' requests that they be allowed to respond either orally or in writing to the reallocations.

In response, the Department of Civil Service filed a Motion for Summary Disposition. This Motion was, for the most part, granted by the Commission on February 13, 1984.[1] The State Civil Service Commission specifically addressed the

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1. The only hearing of any type which was ever held was a hearing on the question of whether the civil service director violated the Commission's rules.

federal due process contentions. (App. pp. 128 et. fol.)

Thereafter, Petitioners perfected an appeal. On June 25, 1985 a majority of a sharply divided Court issued an opinion affirming the decision of the Commission and specifically addressing the federal due process contentions.(App. pp. 66 et. fol.)

A writ of review was subsequently granted by the Louisiana Supreme Court. On February 24, 1986, a sharply divided Louisiana Supreme Court affirmed, again specifically deciding the federal due process contentions. The State Supreme Court concluded: "In a

reallocation determination an employee is not entitled to either pre-reallocation notice or an opportunity to be heard."(App. p. 24)

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

Introduction

We respectfully submit that the above holding of the Louisiana Supreme Court contravenes well settled principles of federal constitutional law. Pre-deprivation notice and "meaningful opportunity to present their case" in an informal hearing are the minimum requirements of procedural due

process. Matthews v. Eldridge, 424 U.S. 319 (1976).

Petitioners are Constitutionally Entitled to Prior Notice

In Greene v. Lindsey, 456 U.S. 444 (1982) this Court held at 449:

> "The fundamental requisite of due process of law is the opportunity to be heard...And the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

Nevertheless, the Louisiana Supreme Court held that petitioners are entitled to no prior notice whatsoever. This holding is, we respectfully submit, a dramatic departure

from settled due process jurisprudence.

Petitioners Are, at the Minimum, Entitled to an Informal Opportunity to Respond

In Goss v. Lopez, 419 U.S. 565 (1975) this Court held that "At the very minimum" a person with a property interest must be given "some kind of hearing"..."preceded by notice." See also Parratt v. Taylor, 451 U.S. 527 (1981); Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975); and Eguia v. Tompkins, 756 F.2d 1130 (5th Cir. 1985) at 1139. In Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (1985), this Court held that due process requires some pre-

deprivation "opportunity to respond" before adverse administrative action is taken affecting a permanent civil service employee. Indeed, the Court noted:

> "An essential principle of due process is that a deprivation of life, liberty, or property be preceeded by notice and opportunity for hearing appropriate to the nature of the case...We have described the 'root requirement' of the Due Process Clause as being that an individual be given an opportunity for a hearing before he is deprived of any significant property interests...The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process

> requirement...(Emphasis supplied)

Furthermore, the holding of the Louisiana Supreme Court in the instant case is in direct conflict with the holding of Stana v. School District of City of Pittsburgh, 775 F.2d 122 (3rd Cir. 1985). In the latter case, retention on an eligibility list was a requirement for public employment in the Pittsburgh School District. Since Stana was removed from this eligibility list, for non-disciplinary reasons, without prior notice or an opportunity to be heard, the Court of Appeals for the Third Circuit held that her rights to

procedural due process had been violated.

Of course, the type of hearing which is constitutionally required, formal or informal, depends upon an analysis of the "nature of the case." Cleveland Board of Education v. Loudermill, supra, at 1493. This requires a balancing of the competing interests at stake. "These are the private interests in retaining employment, the governmental interests in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an

erroneous termination."[2] Id., at 1494 We respectfully submit that the proper striking of the balance in the instant case compels a conclusion that petitioners are constitutionally entitled, at the minimum, to an informal opportunity to respond.

The Private Interests

The Louisiana Supreme Court correctly held that:

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2. It deserves emphasis that the resolutory question in Matthews v. Eldridge, supra, and its progeny is not whether the persons whose property interests are to be affected are entitled to any "opportunity to present their case" but rather whether the persons are entitled to a full blown trial-type hearing or an informal opportunity to respond.

> "[I]t is clear that tenure or classified civil service status is a property right within the meaning of Article 1, Section 2 of our Constitution, a prerequisite to a due process challenge. Delta Bank and Trust Company v, Lassiter, 383 So.2d 330 (1980). Under our constitution and the Civil Service Rules, an employee who has gained classified permanent civil service status has an entitlement to his position, since he has already received the position, and applicable law guarantees him continued employment, save for some exceptions (i.e. disciplinary sanctions for cause).[Citations omitted] Having concluded that a classified permanent employee enjoys a property right in maintaining his status, it is axiomatic that his position may not be changed or abolished without due process of law. (App. pp. 25-27)

As noted by the Federal Court in Eguia v. Tompkins, supra, at 1138-1139:

> "There can be no doubt that the plaintiff's interest in his salary and expense reimbursement is a property interest protected by the Constitution...Mr. Eguia's interest in the receipt of his salary is no less substantial than the property interests protected in Sniadach and Fuentes"

In Eguia v. Tompkins, supra, the Court had no difficulty in holding that Mr. Eguia had a property interest in the receipt of one (1) paycheck. In Prince v. City of Junction, Texas, 711 F.2d 582 (5th Cir. 1983) the Court noted at 589: "Whether a junk car has little or great value, it is constitutionally protected." In Parratt v. Taylor, supra, this Court held that a prisoner's hobby kit fell within the definition of

property. Clearly, Petitioners in the instant case have substantial property interests in maintaining their job status and attained levels of earnings.

The Governmental Interests

The Louisiana Supreme Court made the observation, without the benefit of any evidence, that: "were an employee entitled to notice and a hearing in every reallocation, maintenance of a uniform pay system would be jeopardized." (App. p. 37) This observation was not even suggested by counsel for the Department of Civil Service.

We respectfully submit that procedural fairness in

reallocations would not jeopardize the uniform pay system. In Cleveland Board of Education v. Loudermill, supra, at 1495, the Court noted that " the employer shares the employee's interest in avoiding disruption and erroneous decisions." An analogous situation obtains in reallocations. The Department of Civil Service has no interest in improper reallocations based on inaccurate facts. Indeed, we respectfully submit that the Department shares the employee's interest in avoiding erroneous reallocations. It is simply wrong, we respectfully submit, for the Louisiana Supreme Court,

without the benefit of any evidence or specific demonstration from the Department of Civil Service, to conclude that procedural fairness in reallocations would jeopardize the uniform pay system. Basic constitutional protections should not be eviscerated in the interest of serving an overriding governmental interest without, at least, a clear showing that such a governmental interest does, in fact, exist.

In the same vein, there is nothing in the record of this case showing that any undue fiscal or administrative burdens would result if employees were

given prior notice of reallocations and an informal opportunity to respond. Indeed, the Louisiana Civil Service Commission already has in place elaborate notice and hearing mechanisms with a staff of competent attorney-referees. It is a good and fair system that is used to provide a full blown trial-type hearing in <u>every</u> other type of personnel action (from reprimands to suspensions to terminations) and there is no reason whatsoever why the same system could not be easily used to provide an informal opportunity for an employee facing reallocation to respond.

The Risk of an Erroneous Reallocation

The Louisiana Supreme Court held, without the benefit of any evidence, that:

> "[a reallocation] does not center on any facts surrounding the employee whatsoever. A reallocation is a result of an internal decision made by the director after reviewing the job duties of an employee and comparing them with previously outlined job classifications. In this regard, there is little chance for an erroneous decision."(App. p. 32)

This finding is not only not based on any evidence, it is also wrong.

In the first place, there are facts of issue in this case and they have been properly put at issue by petitioners' appeal

to the Commission. This is not a case where the facts are clear and it is legally erroneous for the State Court to conclude, on the face of the pleadings, to the contrary. Surely, an administrative official can be wrong about the work an employee actually performs, as he can be wrong about any other factual matter, and it is erroneous for a Court to conclusively presume to the contrary.

In Cleveland Board of Education v. Loudermill, supra, this Court held at 1494:

> "[S]ome opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision."

Moreover, the Louisiana Supreme Court recognized that:

> "It is when the focus of the reallocation changes to considerations of the employee (i.e. allegations of discrimination), or where there are allegations of a Rules violation, that notice and an opportunity to be heard crystalizes into something meaningful. Article 1, § 2 would require that at this point there be these minimal procedural protections." (App. p. 35)

There are, in this case, both allegations of considerations of the employee as well as allegations of a rule violation. Indeed, petitioners have alleged that:

1. They were singled out for reallocation due to the personal animosity of their supervisor;

2. The only employees whose positions were reallocated were those who worked for this particular supervisor; and

3. They are the only hospital employees whose salaries are being reduced.

Therefore, these allegations of the appeal letter certainly focus on the individual employees and crystalize notice and opportunity to be heard into something meaningful.

Furthermore, in Cleveland Board of Education v. Loudermill, supra, this Court held at 1494:

> "Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to

> invoke the discretion of the decision maker is likely to be before the termination takes place...[T]he termination involved arguable issues, and the right to a hearing does not depend on a demonstration of certain success."

The Court further explained at 1494 n. 8:

> "The point is that where there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one. This is one way in which providing effective notice and informal hearing permitting the [employee] to give his version of events will provide a meaningful hedge against erroneous action. At least the [employer] will be alerted to the existence of disputes about facts and arguments about cause and effect...[H]is discretion will be more informed and we think the risk of error substantially reduced."

Thus, even if the facts in this case were clear, and they certainly are not, petitioners are still entitled to an informal opportunity to respond with regard to the appropriateness or necessity for the reallocations.

Post-Deprivation Proceedings in this Case

In Cleveland Board of Eduation v. Loudermill, supra, this Court held:

> "The existence of post-termination procedures is relevant to the necessary scope of pre-termination procedures (1496, n.12)...Our holding rests in part on the provisions in Ohio law for a full post-termination hearing."(1496)

Since Ohio law provided for a full administrative hearing and

judicial review, this Court held that only notice and an informal opportunity to respond were required by the due process clause.

In the instant case, however, petitioners were not given the right to any post-deprivation formal hearing concerning either the facts upon which the reallocations were based or the necessity or appropriateness of the reallocations.

The Louisiana Supreme Court noted that "in some instances due process is fulfilled by a 'post-deprivation' hearing." (App. p. 37) This proposition is correct, as far as it goes, but

it is subject to an important qualification: the opportunity to be heard must be "at a meaningful time and in a meaningful manner." Barry v. Barchi, 443 U.S. 55 (1979). The limited rule violation hearing held in this case fulfilled neither requirement. In the first place, it cannot be said on this record that the hearing of July 10, 1984 (approximately one (1) year and 8 months after the reallocations of October 11, 1982) was timely as a matter of law. Cf Eguia v. Tompkins, supra, at 1140, where the Court could not agree that a 14 month delay was timely as a matter of law. Secondly, the limited rule

violation hearing was not held in a meaningful manner because:

(1) It was limited to the question of whether there was a rule violation and did not consider either the facts alleged by Petitioners in their appeal letter, the facts upon which the reallocations were based, or the necessity or appropriateness of the reallocations;

(2) The Commission had already pre-judged the question as to who should have the final decision on the reallocations in this case. Indeed, it had expressly concluded: "The Director is the logical person to make the final allocation decision." (App. p.143)

(3) There was no de novo hearing but petitioners were put in the impossible position of appellants with the burden of persuading the

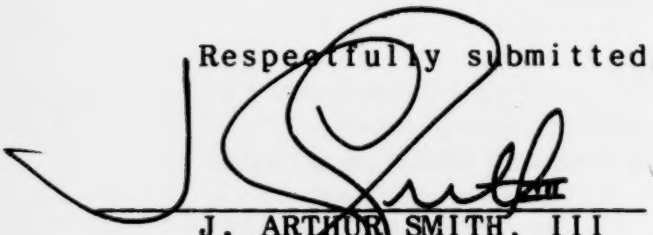
Commission that its Director had violated its own rules and overriding a well-nigh conclusive presumption of correctness of the Director's decision.

Conclusion

We respectfuly conclude that a person with a property right to be affected is entitled to prior notice and an opportunity to respond. The opportunity to respond does not necessarily have to be a full blown trial type hearing, but it is wrong and legally incorrect to hold that a permanent tenured civil service employee may be deprived of a substantial portion of his hard earned wages by procedures which are totally lacking in minimal due process.

We therefore respectfully conclude that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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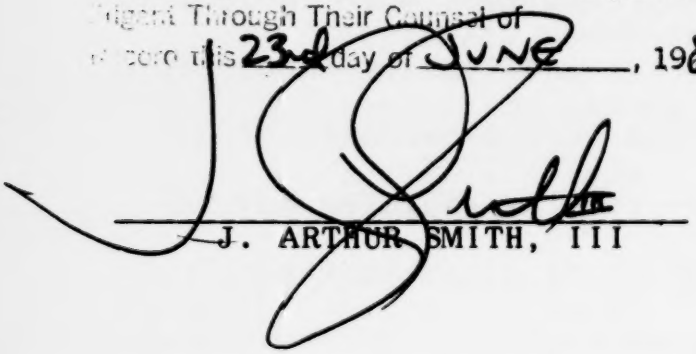
CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing have been mailed, Postage prepaid, UNITED STATES MAIL, to all parties Litigant Through Their Counsel of Record this 23rd day of JUNE, 1986.



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